

# Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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March 15, 2005

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GSBCA 16560-RELO

In the Matter of MICHAEL V. TORRETTA

Michael V. Torretta, Chantilly, VA, Claimant.

Joseph E. Ross, Associate Chief Counsel, Office of Chief Counsel, Drug Enforcement Administration, Washington, DC, appearing for Department of Justice.

**DANIELS**, Board Judge (Chairman).

Special Agent (SA) Michael V. Torretta of the Drug Enforcement Administration (DEA) challenges his agency's determination that he is responsible for thirty-five percent of the cost of moving his household goods between permanent duty stations. Because SA Torretta has proved that the weights on which the agency relies in asserting this charge are clearly erroneous, we hold that the agency may not assess the charge.

## Background

Of great importance to this case, statute provides that when an agency transfers an employee in the interest of the Government from one permanent duty station to another, it must pay for the expenses of transporting 18,000 pounds – but no more – of the employee's household goods and personal effects. 5 U.S.C. § 5724(a)(2) (2000). The cost of transporting additional goods is the responsibility of the employee. *James R. Wyatt, Jr.*, GSBCA 16038-RELO, 04-1 BCA ¶ 32,573 (*citing George W. Currie*, GSBCA 15199-RELO, 00-1 BCA ¶ 30,814; *Robert K. Boggs*, GSBCA 14948-RELO, 99-2 BCA ¶ 30,491).

DEA transferred SA Torretta from New York to Massachusetts in 1999. At that time, the estimated weight of his household goods was 17,200 pounds.

In August 2002, DEA directed SA Torretta to move again, this time to Virginia. The agency engaged Paul Arpin Van Lines (Arpin) to transport his goods. An Arpin representative estimated the weight of the goods at 22,000 pounds. Although SA Torretta was "confident that during the three years that [he] was in Massachusetts, [he] did not purchase anything that would so substantially increase the weight of [his] household goods,"

he proceeded to donate, sell, or discard many items, some of which were quite heavy, in an effort to decrease the weight.

On August 20, 2002, Arpin removed SA Torretta's goods from his old residence in Massachusetts. The carrier placed the items in two trucks. On August 25, Arpin delivered the goods to the employee's new residence in Virginia. The carrier arrived with a third truck, which it said it had brought because the truck contained supplies necessary to complete a subsequent move. SA Torretta says that he gave the Arpin employees a check marked "tip for movers" in thanks for their good service.

Shortly thereafter, a representative of the DEA transportation unit advised SA Torretta that Arpin had reported to DEA that his goods weighed 27,720 pounds. The part of the total weight which was in excess of 18,000 pounds (9,720 pounds) constituted 35.06% of the total. The representative said that SA Torretta was consequently responsible for 35.06% of the cost of the move – \$4,036.55.

The representative later furnished to SA Torretta copies of weight tickets Arpin had given to DEA. The tickets were for three trucks. One showed a truck as weighing 30,520 pounds on August 23 and 17,800 pounds on August 30; the difference between these amounts is 12,720 pounds. The second ticket showed a truck as weighing 29,160 pounds on August 23 and 18,220 pounds on August 31; the difference in amounts is 10,940 pounds. The third ticket showed a truck as weighing 13,200 pounds on August 23 and 9,140 pounds on August 30; the difference is 4,060 pounds. SA Torretta, knowing that his belongings had been transported in only two trucks, asked that DEA look into the matter.

DEA contacted Arpin, which alleged that SA Torretta had attempted to "make a deal" with an Arpin employee to alter the documented weight of his household goods to be within the 18,000-pound threshold for which DEA was financially responsible. DEA asked its Board of Professional Conduct to investigate the allegation. The board concluded that "there is no evidence to substantiate the allegation against SA Torretta and, therefore, [recommended] that he be issued a Letter of Clearance in this matter."

DEA also asked two independent parties to advise it as to the allocation between itself and SA Torretta of the cost of the move. In October 2002, shortly after the move, DEA asked the General Services Administration (GSA) to determine whether Arpin's assertion that the goods weighed 27,720 pounds was supported. A representative of GSA's Traffic Management Program responded, "The weight tickets look proper and the pre-move survey shows that the carrier originally identified that the shipment was estimated to be over weight. Re-weigh took place with a weigh master certificate and was prior to November 1, 2002. . . . [T]he charges are based on the reweigh weight." He then explained that because the net weight of the shipment was 19,800 pounds, SA Torretta was responsible for the cost of shipping the 1,800 pounds by which this weight exceeded 18,000 pounds. The excess weight divided by the total weight was 9.09%, so the "[r]elocating employee will be responsible for 9.09% of the total charges." The record contains no evidence, other than this memorandum, as to a reweighing.

Much later, in April 2004, DEA asked an experienced employee of Paxton Van Lines, Inc. to conduct what the Paxton employee called "a constructive weight analysis of the

shipment in question based on the inventories provided." The analysis "indicated a weight close to or over the actual weight (27700 [sic] lbs.) indicated on the weight certificates." The Paxton employee qualified his report by noting, however, that among the inventories provided, "[n]ot all items were legible, nor was there detailed description of any of the furniture listed." He also expressed concern that the shipment had been "'back weighed'". The vehicles were not weighted [sic] empty before the shipment was picked up but rather were weighed empty after delivery, in this case a week later. Not uncommon but not best practice either."

DEA relies on the Paxton employee's analysis in continuing to assert that SA Torretta's household goods weighed 27,720 pounds when he moved from Massachusetts to Virginia, and that he owes the agency \$4,036.55 as his share of the cost of transporting the goods.

### Discussion

An agency may pay for transporting only 18,000 pounds of an employee's household goods when the employee is transferred to a new duty station. Many transferred employees whose belongings weigh more than this amount are astonished to hear that their goods are so heavy as to cause them to have to pay for part of the shipment. When the agencies rely on certified net weights of the goods, we have rarely found for the employees. Mere suspicion that the reported weight of the goods is not accurate is not a sufficient reason to overturn an agency's demand for payment. *Charles E. Pixley*, GSBCA 16484-RELO (Feb. 4, 2005). Nor is an employee's belief that the weight of his goods could not have increased as much as alleged between recent moves enough to defeat documentation of the weight at the time of the second move. *Jaime V. Mercado*, GSBCA 16313-RELO, 04-1 BCA ¶ 32,583; *Wyatt; Helene Mikes*, GSBCA 15374-RELO, 00-2 BCA ¶ 31,138, *reconsideration denied*, 01-1 BCA ¶ 31,214 (2000); *Ingrid Rodenberg*, GSBCA 13729-RELO, 97-2 BCA ¶ 29,027.

"The burden of proving that certified weights for the movement of household goods are incorrect is exceedingly heavy and rests on the claimant. Agency determinations of net weight will be set aside only where a claimant can show clear and substantial evidence of error or fraud." *Robert G. Gindhart*, GSBCA 14288-RELO, 98-1 BCA ¶ 29,405 (1997); *see also Mercado; Richard D. Grulich*, GSBCA 15800-RELO, 02-2 BCA ¶ 31,891; *Mikes; Ira A. C. Peets*, GSBCA 15294-RELO, 00-2 BCA ¶ 31,058.

We have decided only two cases in which the employee met this burden. The first was *Gindhart*. There, due to mistakes by the carrier's personnel, the goods being moved had been allowed to become waterlogged. There was no way of knowing how much the goods themselves, less the absorbed water, actually weighed. The second case was *Jerry Jolly*, GSBCA 14158-RELO, 98-1 BCA ¶ 29,518 (1997). There, both the employee and the agency were convinced that movers' documentation of weight was unreliable because it was handwritten and unsigned. In both these cases, we held that unless the agency had reliable evidence as to actual weight, it could not charge the employee for any portion of the shipment.

This is the third case in which we find that the employee has met the heavy burden of showing clear and substantial evidence of error or fraud in the certified weights on which the agency relies in imposing a charge on the employee.

The record contains two pieces of evidence on which DEA might rely in asserting that SA Torretta's household goods weighed 27,720 pounds when they were moved from Massachusetts to Virginia at the time of his transfer between those locations. These pieces of evidence are the weight tickets themselves and the 2004 analysis by a Paxton employee.

The weight tickets themselves cannot be relied on. The tickets are for three trucks, but SA Torretta's goods were shipped in only two trucks. The tickets for the two trucks which actually contained the goods show gross weights at the time the trucks were in transit between Massachusetts and Virginia. The tare (empty) weights for these trucks were taken a week later, however – after a subsequent move had been made. There is no way of knowing whether the contents of the trucks at that time were the same as the contents at the time of SA Torretta's move. Regulation requires that they be so. 49 CFR 375.7 (2002). Further casting doubt on the reliability of the weight tickets is the low credibility in this matter of the firm which submitted the tickets, Arpin. A DEA review board determined that Arpin made a completely baseless allegation against SA Torretta.

The Paxton employee's analysis cannot be relied on, either. The conclusion reached through the analysis is that the weight of SA Torretta's goods was "close to or over the actual weight (27700 [sic] lbs.) indicated on the weight certificates." Because the certificates clearly were for much more weight than was appropriate – even if only because they included weight for a truck which did not carry any of SA Torretta's belongings – any analysis which confirms the total weight shown on the certificates is inherently untrustworthy. Further, the author acknowledges that the analysis is based in part on illegible entries of inventory and a lack of detail in the description of some major items. The analysis merits no greater importance than the employee's suspicion that his goods taken as a whole could not have weighed more than they did three years earlier.

The record contains another piece of evidence on which DEA might rely in asserting that SA Torretta's goods weighed more than 18,000 pounds – a memorandum from a GSA employee which asserts that on a reweigh, the goods weighed 19,800 pounds. The record does not contain any documentation of a reweigh, however, and we question how a reweigh could have occurred, given that all the goods were unloaded at SA Torretta's new residence once the trucks arrived in Virginia. We have no basis for concluding that the goods weighed 19,800 pounds.

### Decision

Because SA Torretta has met the heavy burden of proving that the certified weights on which the agency relies are clearly erroneous, his claim is granted. DEA may not collect any money from him in connection with the transportation of his household goods from Massachusetts to Virginia.

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STEPHEN M. DANIELS  
Board Judge